

1 KEVIN P. MUCK (CSB No. 120918)
kmuck@fenwick.com
2 JENNIFER C. BRETAN (CSB No. 233475)
jbretan@fenwick.com
3 MARIE C. BAFUS (CSB No. 258417)
mbafus@fenwick.com
4 TAHIR I. GOLDEN (CSB No. 282948)
tgolden@fenwick.com
5 FENWICK & WEST LLP
555 California Street, 12th Floor
6 San Francisco, CA 94104
Telephone: (415) 875-2300
7 Facsimile: (415) 281-1350

8 Attorneys for Defendant James T. Murrin

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 IN RE HP SECURITIES LITIGATION,

Case No. 12-CV-05980 CRB

14 This Document Relates To: All Actions

CLASS ACTION

15 **DEFENDANT JAMES T. MURRIN'S**
16 **REPLY MEMORANDUM IN SUPPORT**
17 **OF MOTION TO DISMISS**
CONSOLIDATED COMPLAINT

18 Date: November 8, 2013
19 Time: 10:00 a.m.
Place: Courtroom 6
20 Judge: The Honorable Charles R. Breyer

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1 **I. INTRODUCTION**

2 Defendant James T. Murrin is in an unusual situation: he is not alleged to have made any
3 misstatement or otherwise violated Section 10(b),¹ and is sued solely as a purported “control
4 person” of Hewlett-Packard Company (“HP” or the “Company”). Given the admitted absence of
5 any basis for a primary claim against him, Mr. Murrin’s motion to dismiss (“Mot.”) challenged
6 plaintiff to identify facts – as opposed to bald conclusions – to support a secondary claim under
7 Section 20(a). Nowhere in its 66-page Omnibus Memorandum in Opposition to Defendants’
8 Motions to Dismiss (“Opposition” or “Opp.”) does plaintiff begin to meet that challenge.

9 Indeed, setting aside the absence of an underlying violation of Section 10(b) by HP² –
10 which itself is fatal to the Section 20(a) claim – the Opposition actually confirms plaintiff’s
11 inability to plead that Mr. Murrin “controlled” HP. At the outset, plaintiff tries to disavow its
12 burden to plead particularized facts showing such “control,” going so far as to assail (erroneously)
13 a prior decision by this Court as inconsistent with “recent case law.” The reason the Opposition
14 goes to such lengths to circumvent Fed. R. Civ. P. 9(b), and controlling authority from this Court,
15 is evident: plaintiff knows that its Consolidated Complaint (“Complaint” or “Compl.”) is devoid
16 of facts suggesting Mr. Murrin’s control over HP or its allegedly actionable statements.

17 But even if the Section 20(a) claim were not subject to heightened pleading requirements,
18 the Opposition is still unable to show that the meager allegations regarding Mr. Murrin – *i.e.*, that
19 he served as HP’s controller for a subset of the class period and signed one document – are
20 adequate to plead control under any standard. The sort of boilerplate offered in the Complaint has
21 routinely been held to be insufficient to allege control as a matter of law. The Opposition
22 underscores that point by repeatedly suggesting that various paragraphs of the Complaint support a
23 claim against Mr. Murrin when, in reality, those paragraphs ***do not even mention him***. Put
24 simply, plaintiff’s need to mischaracterize its own Complaint is a concession that the ***actual***
25 allegations do nothing to state a claim against Mr. Murrin. His motion should be granted.

26

¹ All statutory references are to the Securities Exchange Act of 1934 (the “1934 Act”).

27 ² Mr. Murrin refers the Court to HP’s Reply Memorandum in Further Support of Motions to
28 Dismiss (“HP Reply”) for a discussion of the reasons why plaintiff fails to plead an underlying
 Section 10(b) claim in accordance with the Private Securities Litigation Reform Act (PSLRA).

1 **II. THE OPPOSITION MAKES CLEAR THAT PLAINTIFF IS UNABLE TO PLEAD**
2 **A CONTROL PERSON CLAIM AGAINST MR. MURRIN**

3 **A. Plaintiff Cannot Evade Its Obligation to Plead Particularized Facts Sufficient**
4 **to Demonstrate Mr. Murrin’s Supposed Control Over HP**

5 Plaintiff’s attempt to justify its claim against Mr. Murrin begins inauspiciously: it tries to
6 shirk the obligation to plead control with the particularity required by Fed. R. Civ. P. 9(b). *See*
7 *Opp.* at 55. The notion that plaintiff need not comply with Rule 9(b) flies in the face of *Howard v.*
8 *Hui*, 2001 WL 1159780 (N.D. Cal. Sept. 24, 2001) (Breyer, J.), in which this Court held that a
9 control person claim under Section 20(a) “is an allegation of fraud” and such “[a]llegations of
10 fraud must be pled with particularity.” *Id.*, at *4. Thus, while “a plaintiff need not plead (or
11 ultimately establish) the control person’s scienter distinct from the controlled corporation’s
12 scienter ... a plaintiff must plead the circumstances of the control relationship with sufficient
13 particularity to satisfy rule 9(b).” *Id.* The Court noted that its holding was consistent with other
14 decisions, including Ninth Circuit authority. *Id.*

15 Unable to assail this Court’s holding or analysis, the Opposition glibly suggests that
16 *Howard* is contrary to “the weight of recent case law.” *Opp.* at 55. However, plaintiff makes no
17 effort to square that suggestion with the numerous cases from this District and elsewhere –
18 including those cited in the moving papers (*see* *Mot.* at 5) – that have similarly held allegations of
19 control must be supported by particularized facts. *See, e.g., Glenbrook Capital Ltd. P’ship v. Kuo*,
20 2009 WL 839289, at *18 (N.D. Cal. Mar. 30, 2009); *In re Atmel Corp. Deriv. Litig.*, 2008 WL
21 2561957, at *11 (N.D. Cal. June 25, 2008); *In re Ramp Networks, Inc. Sec. Litig.*, 201 F. Supp. 2d
22 1051, 1063 (N.D. Cal. 2002); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1277
23 (N.D. Cal. 2000); *City of Westland Police & Fire Ret. Sys. v. Sonic Solutions*, 2009 WL 942182, at
24 *11 (N.D. Cal. Apr. 6, 2009).

25 For example, Judge White has explained that because a control person claim is “based on
26 an [alleged] underlying violation of Section 10(b),” it necessarily follows that “the pleading
27 requirements for both violations are the same.” *Glenbrook*, 2009 WL 839289, at *18. Judge
28 Spero reached the same conclusion, noting that Section 20(a) liability is “derivative” of Section
10(b) claims that are subject to heightened pleading requirements. *Ramp*, 201 F. Supp. 2d at 1063.

1 And Judge Fogel likewise noted that, in light of the hurdles that must be cleared to state an
2 underlying Section 10(b) claim under the PSLRA, plaintiffs asserting a secondary claim under
3 Section 20(a) must “plead the circumstances of the control relationship with particularity.” *Atmel*,
4 2008 WL 2561957, at *11 (quoting *In re Splash Tech. Holdings, Inc. Sec. Litig.*, 2000 WL
5 1727405, at *16 (N.D. Cal. Sept. 29, 2000)).³ The Opposition’s failure to acknowledge these
6 authorities – much less address them – reflects plaintiff’s awareness that: (i) control person claims
7 are subject to the standard enunciated by this Court in *Howard*; and (ii) plaintiff cannot meet that
8 standard.

9 **B. Under Any Pleading Standard, the Opposition Fails to Identify Any**
10 **Allegations in the Complaint Sufficient to Show That Mr. Murrin**
11 **Controlled HP**

12 Regardless of whether a Section 20(a) claim is subject to Fed. R. Civ. P. 9(b) or a lesser
13 pleading standard, the Opposition does not contest that plaintiff must allege Mr. Murrin’s
14 “participation in the day-to-day affairs of [HP]” and his “power to control corporate actions.”
15 *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000). Even under Fed. R. Civ. P. 8,
16 plaintiff must allege facts plausibly establishing a control relationship. *Ashcroft v. Iqbal*, 556 U.S.
17 662, 679 (2009). Yet plaintiff fails to identify *any* allegations – particularized or otherwise –
18 indicating such “participation,” “power” or “control.”

19 As discussed in the moving papers, the allegations regarding Mr. Murrin’s supposed
20 control over HP are limited to Paragraph 116 of the Complaint. *See* Mot. at 5-6. That lone
21 paragraph makes clear that the primary basis for plaintiff’s claim against Mr. Murrin is his job
22 title. Indeed, the 66-page Opposition confirms that conclusion by making *only one reference* to
23 Paragraph 116, which reads (in its entirety) as follows: “Defendant Murrin was HP’s Chief
24 Accounting Officer during the Class Period. ¶ 116.” Opp. at 56.

25 Plaintiff does not dispute that an individual’s job title or status as a corporate officer is

26 ³ In arguing that the law has somehow changed since *Howard*, plaintiff cites *Nguyen v. Radiant*
27 *Pharms. Corp.*, 2011 U.S. Dist. LEXIS 124631, at *26 (C.D. Cal. Oct. 26, 2011). However, that
28 case does not even mention *Howard* or address this Court’s analysis, and instead merely relies on
Teamsters Local 617 Pension & Welfare Funds v. Apollo Group Inc., 690 F. Supp. 2d 959 (D.
Ariz. 2010). *Apollo*, in turn, is a case expressly based on the erroneous premise that a Section
20(a) claim does not implicate fraud (*id.* at 966-67) – ignoring that control person liability is
entirely “derivative” of Section 10(b) liability. *See Ramp*, 201 F. Supp. 2d at 1063.

1 insufficient as a matter of law to plead control. *See, e.g., McKesson*, 126 F. Supp. 2d at 1277
2 (dismissing control person claims against executives); *In re Downey Sec. Litig.*, 2009 WL
3 2767670, at *15 (C.D. Cal. Aug. 21, 2009) (same); *Sonic Solutions*, 2009 WL 942182, at *11
4 (same). Instead, plaintiff must plead that each officer had “a significant degree of day-to-day
5 operational control, amounting to the power to dictate [the Company’s] conduct or operations.”
6 *McKesson*, 126 F. Supp. 2d at 1277 (quotation omitted); *see also In re Impac Mortg. Holdings,*
7 *Inc. Sec. Litig.*, 554 F. Supp. 2d 1083, 1101 n.12 (C.D. Cal. 2008). Recognizing that pleading
8 obligation, plaintiff makes the generic contention that the individual defendants “were actively
9 involved in [HP’s] day-to-day operations,” and cites three paragraphs as ostensible support. Opp.
10 at 56 (citing Compl. ¶¶ 119, 123, 240). However, ***not one of those three cited paragraphs even***
11 ***mentions Mr. Murrin*** or identifies a single thing he purportedly did as an executive – let alone
12 alleges acts or conduct sufficient to show his “power to dictate” HP’s operations (*McKesson*, 126
13 F. Supp. 2d at 1277) or “power to cause [HP] to engage[] in the alleged conduct.” *Downey*, 2009
14 WL 2767670, at *15.⁴ Thus, the allegations regarding Mr. Murrin are (in the words of Chief
15 Judge Wilken) “bare legal conclusions ... devoid of any factual underpinnings” and insufficient to
16 plead control. *Sonic Solutions*, 2009 WL 942182, at *11.

17 Plaintiff’s citation to *In re Diamond Foods, Inc. Sec. Litig.*, 2012 WL 6000923 (N.D. Cal.
18 Nov. 30, 2012) (Opp. at 56), actually highlights its pleading failure. In *Diamond*, the court found
19 that the complaint contained specific allegations regarding the day-to-day operational roles of the
20 CEO and CFO and their involvement in the alleged misconduct at issue. *Id.* at *12-13. Those
21 allegations, and the fact that the CEO and CFO “sat on Diamond’s Board of Directors,” were
22 adequate to plead those individuals’ control over the company. *Id.* at *13. Here, by contrast,
23 plaintiff can identify no averments regarding Mr. Murrin that are even remotely comparable.
24 Rather, the Complaint relies on an unadorned recitation of his job title – and, as plaintiff
25 acknowledges, such boilerplate is inadequate to plead control. *See* Opp. at 55 n.87 (citing *In re*
26 *Metawave Commc’ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1091 (W.D. Wash. 2003)).

27 ⁴ As to Mr. Murrin, the argument that “director status ‘is a sort of red light’ that indicates the
28 potential for day-to-day involvement” (Opp. at 56, quoting *Apollo*, 690 F. Supp. 2d at 976), has no
conceivable relevance. Plaintiff does not allege that Mr. Murrin ever served as a director of HP.

1 Furthermore, the Opposition does not dispute that all of the allegedly actionable statements
2 were made by persons who outranked Mr. Murrin (Mot. at 7), and that the Complaint contains no
3 allegations to address the fundamental illogic of the theory that he somehow “controlled” his
4 superiors. See *Middlesex Ret. Sys. v. Quest Software, Inc.*, 527 F. Supp. 2d 1164, 1194 (C.D. Cal.
5 2007). Nor does plaintiff cite any allegations or legal authority to overcome the conclusion that
6 Mr. Murrin was either “too low-ranking” or too “distant” to exercise control over a corporation
7 the size of HP. See *McKesson*, 126 F. Supp. 2d at 1277. By ignoring these points altogether,
8 plaintiff implicitly concedes the inadequacy of its allegations. Similarly, the Opposition makes no
9 effort to justify the averment that Mr. Murrin’s attendance at HP’s annual shareholder meeting
10 (Compl. ¶ 116) somehow supports a control person claim. See Mot. at 7.

11 With respect to the allegation that Mr. Murrin signed one document – HP’s Form 10-K for
12 fiscal 2011 (Compl. ¶ 116) – the Opposition resorts to misdirection. Plaintiff asserts in a footnote
13 that, “[c]iting *In re Gupta Corp. Sec. Litig.*, 900 F. Supp. 1217, 1227, 1241-43 (N.D. Cal. 1994),
14 Murrin argues that the fact that he signed [the 10-K] is insufficient to allege control,” and then
15 offers a tortured rationale for why reliance on *Gupta* would be misplaced. Opp. at 57 n.90. The
16 problem with plaintiff’s assertion is twofold: not only does the Opposition misstate Mr. Murrin’s
17 actual argument, but he does not rely on *Gupta*. Instead, his moving papers cited an entirely
18 different case – *Splash* – for the proposition that, while an individual’s signature on a document
19 may indicate the “*possibility* of control,” it is still incumbent on plaintiff to furnish additional
20 allegations sufficient to show *actual* control. See Mot. at 7-8, quoting *Splash*, 2000 WL 1727405,
21 at *16 (emphasis added). Tellingly, the Opposition makes no reference to *Splash*, offers no
22 contrary authority, and does not deny that the Complaint is bereft of any allegations regarding Mr.
23 Murrin’s supposed role in the preparation of the 10-K. See Mot. at 8. The Opposition also
24 ignores that – even if plaintiff could allege Mr. Murrin “controlled” the contents of the 10-K – the
25 Complaint offers no conceivable basis for alleging his control over the other allegedly actionable
26 statements. See Mot. at 8; see also *Downey*, 2009 WL 2767670, at *15 (dismissing control person
27 claim where plaintiff failed to allege adequately that the individual defendants had control over
28

company in connection with “acts that violated the securities laws”).⁵

Ultimately, the most notable aspect of the Opposition – at least with respect to Mr. Murrin – is plaintiff’s repeated mischaracterization of what is alleged in the Complaint. The following chart compares the Opposition’s key arguments with the actual pleading:

What the Opposition Claims	What the Complaint Really Says
<p>“[T]he Complaint alleges that HP’s surreptitious efforts to unwind Autonomy’s accounting irregularities were thwarted by a ‘senior member’ of HP/Autonomy’s ‘leadership team,’ who blew the whistle on HP/Autonomy’s misconduct in May 2012, and that HP and Defendants Whitman, Lane, Lesjak and Murrin failed to disclose this material development to shareholders until November 2012. ¶¶ 80-83.”</p> <p>(Opp. at vii; emphasis added.)</p>	<p>The cited paragraphs (Compl. ¶¶ 80-83) do not even mention Mr. Murrin, let alone tie him in any way to awareness of alleged misconduct at Autonomy.</p>
<p>“By December 2011, as Lesjak, Murrin and Whitman learned first-hand about Autonomy’s improper revenue recognition practices, HP simultaneously began a gradual wind-down of those practices which began to manifest in HP/Autonomy’s publicly-reported Software Segment results in February 2012. ¶¶ 77-79, 100, 182-86.”</p> <p>(Opp. at 13; emphasis added.)</p>	<p>Again, the cited paragraphs (Compl. ¶¶ 77-79, 100, 182-86) do not even mention Mr. Murrin, and do not allege in any way that he knew of Autonomy’s allegedly improper revenue recognition practices.</p>
<p>“Rather than disclose that HP was experiencing lower than expected operating margins and license revenue growth as a result of HP’s efforts to unwind Autonomy’s materially inflated revenue, profits, EPS, growth rates and margins, the Complaint alleges that Whitman, Murrin and Lesjak concealed these facts. ¶¶ 74-82, 133-34, 145, 149-58, 182-206.”</p> <p>(Opp. at 15; emphasis added.)</p>	<p>Not one of the cited paragraphs (Compl. ¶¶ 74-82, 133-34, 145, 149-58, 182-206) refers to Mr. Murrin or alleges that he concealed any facts.</p>

Plaintiff’s resort to these mischaracterizations betrays a recognition that the actual allegations of the Complaint do not suffice to plead Mr. Murrin’s control over HP.

⁵ In any event, as discussed in HP’s separate reply brief, plaintiff fails to allege that any statement in the 10-K is actionable. See HP Reply, §§ II.B, IV.A.

1 **III. CONCLUSION**

2 Plaintiff's Opposition confirms that the handful of passing references to Mr. Murrin in the
3 Complaint provide no basis for a control person claim against him. Moreover, plaintiff does not
4 suggest there are any additional facts it could allege if given an opportunity to replead.

5 Mr. Murrin's motion to dismiss should accordingly be granted without further leave to amend.

6 Dated: October 2, 2013

FENWICK & WEST LLP

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8 By /s/ Kevin P. Muck
 Kevin P. Muck

9 Attorneys for Defendant James T. Murrin
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